Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

RICO ARNEZ SANDERS
RESPONDENT

ON CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN

A PETITION FOR A WRIT OF CERTIORARI

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26 pp

QUESTION PRESENTED

MAY A DEFENDANT, WHO HAS OBTAINED COUNSEL FOLLOWING ARRAIGNMENT, AND THROUGH THAT COUNSEL, REQUESTED A POLICE ADMINISTERED POLYGRAPH EXAMINATION, AND WHO IS WARNED, BEFORE AND AFTER THE POLYGRAPH EXAMINATION, PURSUANT TO *ARIZONA V MIRANDA*, 384 US 436; 88 S Ct 1135; 89 L Ed 2d 694 (1966), OF HIS RIGHT TO HAVE COUNSEL PRESENT DURING QUESTIONING, AND THAT HIS STATEMENTS WILL BE USED AGAINST HIM IN COURT, WHO WAIVES THE PRESENCE OF COUNSEL AND ACKNOWLEDGES THE WARNING, BEFORE AND AFTER THE POLYGRAPH EXAMINATION, AND CONFESSES TO THE CRIME IN TWO SEPARATE INTERVIEWS CONDUCTED IMMEDIATELY AFTER THE POLYGRAPH EXAMINATION, HAVE HIS CONFESSIONS SUPPRESSED BY CLAIMING HIS WAIVER OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL WAS INVALID BECAUSE COUNSEL WAS NOT PRESENT TO AGREE TO HIS WAIVER OF COUNSEL'S PRESENCE?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

RICO ARNEZ SANDERS,
RESPONDENT

NOW COME the People of the State of Michigan, by Elwood L. Brown, Prosecuting Attorney for the County of St. Clair, and Peter R. George, Chief Assistant Prosecuting Attorney, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, issued October 25, 1994, leave denied by the Michigan Supreme Court on July 12, 1995, two justices dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported, and is appended as Appendix A. The order of the Michigan Supreme Court is unreported at this time and is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgement of the Michigan Court of Appeals was entered October 25, 1994. The Michigan Supreme Court denied discretionary appeal, with two justices dissenting from the denial, on Petitioner's motion for reconsideration on July 12, 1995. The jurisdiction of this Court is invoked under 28 USC § 1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

The **Fifth Amendment** to the United States Constitution provides: "No person. . .shall be compelled to be a witness against himself. . . ."

The **Sixth Amendment** to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right. . . to have the assistance of counsel for his defense."

The **Fourteenth Amendment** to the United States Constitution provides: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 20 of the Michigan Constitution of 1963 provides: "In every criminal prosecution, the accused shall have the right. . . to have the assistance of counsel for his defense. . . ."

STATEMENT OF THE CASE

Respondent was convicted of two counts of felony first degree murder and two counts of possession of a firearm during the commission of a felony. He received two concurrent sentences of life imprisonment for the murder convictions, and two sentences of two years, concurrent to each other, but consecutive to the murder sentences, for the firearm offenses.

Respondent and his co-defendant were arrested on 27 March 1991. Respondent requested counsel at his arraignment and Ronald Flanigan was appointed to represent him.

Early in April of 1991, Respondent directed his attorney to secure for him the opportunity to take a polygraph examination on the issue of whether he or his co-defendant was the direct actor in the two homicides. That is, Respondent insisted a polygraph would "clear" him of actually pulling the trigger. Mr. Flanigan advised against this, based on his many years experience as both an assistant prosecutor and a criminal defense practitioner. Respondent insisted and counsel asked the prosecutor to arrange for a Michigan State

Police polygraph examiner to administer a test to respondent. Counsel advised Respondent not to talk to the examiner except as necessary to take the test, and not to talk to the examiner or any other police officers after the polygraph.

During the pretest interview, Respondent was Mirandized[1] and signed a Michigan State Police form detailing his rights, acknowledging that he was waiving those rights, and acknowledging the fact that anything he said would be used against him. He then told the examiner a detailed story about how he and his co-defendant had been driven from Detroit to Port Huron and dropped off for the express purpose of selling crack cocaine. He told how they were able to sell over $1000 of cocaine during the time they were in town. He explained how he and the co-defendant decided to kill the two victims and take their car in order to avoid paying the victims for taking them back to Detroit. He explicitly placed the gun in the co-defendant's hand, and the actual shooting squarely on the co-

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[1]Arizona v Miranda, 384 US 436; 86 S Ct 1602; 89 L Ed 2d 694 (1966).

defendant's shoulders, limiting his own part to that of a co-conspirator and accessory after the fact.

In the opinion of the polygraph examiner, Respondent's charts indicated deception, in whole or in part. When he was advised of this, Respondent admitted that he was, in fact, the "shooter," and reiterated the same story he told in the pre-examination interview. This time, however, admitting he was the one who had the gun, and he was the one who shot each victim in the back.

The polygraph examiner told the Port Huron Police Detective who had escorted Respondent to the State Police facility that Respondent might have something to say to him. The Detective advised Respondent of his right to have counsel present during any questioning and warned him that anything he said would be used against him. Respondent, again, waived the presence of counsel and spoke to the Detective. Respondent told the Detective essentially the same version of events that he had related to the polygraph examiner after the polygraph.

Subsequently, Respondent expressed dissatisfaction with his attorney's performance, alleging he had "misrepresented" him, and Mr. Flanigan was allowed to withdraw. New counsel was appointed and made his first order of business an attack on the voluntariness of Respondent's statements to the officers based on violation of his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. A evidentiary hearing on this issue was held on 19 August 1991. Both the polygraph examiner and the Port Huron Police Detective testified. Respondent declined to testify. Based on the statements of the officers, and copies of correspondence between Mr. Flanigan and the prosecutor, the trial court found Respondent had initiated the contact with the police, had been properly Mirandized before each statement, and that both statements were freely and voluntarily made, and no violation of Respondent's constitutional rights occurred.

The Michigan Court of Appeals disagreed and reversed. That court held that Respondent's rights under the Sixth Amendment to the United States Constitution were violated when Petitioner only

proved that Respondent told the officers that he understood his Miranda rights, and that he waived those rights. That is, that when a criminal defendant has counsel, some undefined higher standard is required for that defendant to waive the presence of counsel at an interview initiated by the defendant. The court thus held that the Respondent's multiple confessions were improperly admitted, reversing the convictions and suppressing the confession on any retrial.

Petitioner sought leave to appeal to the Michigan Supreme Court, which was ultimately denied on 12 July 1995 with two justices dissenting.

REASONS FOR GRANTING THE WRIT

This Court has had numerous occasions to discuss the interplay of the right to the assistance of counsel, and the conditions required for a valid waiver of that right, under both the Fifth and Sixth Amendments. The instant case presents a factual basis not previously analyzed by this Court under the Sixth Amendment. It also presents the interesting situation where it appears the Michigan Court of Appeals believes that a criminal defendant may disregard the advise of his attorney, confess his crimes to police officers following repeated *Miranda*[2] warnings, (and the concomitant waiver of the rights set out therein) and then successfully claim his Sixth Amendment right to counsel was violated and his repeated waiver of the right was invalid because his *attorney* did not agree that he could talk to the police without the attorney present!

On direct appeal, following his convictions, Respondent relied exclusively on the Sixth Amendment (and the parallel provision of the Michigan Constitution, Const 1963, art 1, § 20) in his

---

[2]*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

argument that the confessions had been improperly admitted. Respondent cited two Michigan Supreme Court cases, *People v Leonard*, 421 Mich 207; 354 NW 2d 625 (1984), and *People v Ray*, 431 Mich 260; 430 NW 2d 626 (1988), for the proposition that the Sixth Amendment and Const 1963, art 1, § 20, provide a basis for finding some right of the Respondent's attorney to "trump" his client's waiver of his presence at an interrogation initiated by Respondent. Sadly enough for defense attorneys everywhere, neither case stands for anything of the sort.

In *Leonard*, the opinion of the court, a one page, *per curiam* opinion, acknowledged that the Michigan Court of Appeals had based *its* decision on Sixth Amendment grounds, *Leonard*, 421 Mich at 210, but premised its own holding that the statements in issue in that case should not have been admitted on the completely non-constitutional basis that allowing the statements violated the terms of a pre-trial stipulation between the prosecutor and defense counsel. *Id.*

In *Ray*, insofar as the case pertains to the matter at hand, the issue was whether failure to re-advise the defendant of his *Miranda* rights at the conclusion of a polygraph examination would prevent a voluntary and intelligent waiver of those rights, per se. *Ray*, 431 Mich at 276. Relying on this Court's holding in *Wyrick v Fields*, *infra*, the Michigan court adopted a "totality of the circumstances" test for determining whether the waiver of a defendant's *Fifth Amendment* rights could be considered knowing and voluntary. *Id.* Contrary to Respondent's representations to the Michigan Court of Appeals, the Sixth Amendment is mentioned only in passing, *Ray*, 431 Mich at 273-274, and Michigan's own, similar constitutional provisions not at all.

In a further effort to bolster his rather amazing claim that his repeated acknowledgment of *Miranda* warnings, and repeated agreements to speak with police officers without the presence of his attorney, despite those warnings, should somehow be ignored, Respondent attempted to find a more rigorous standard for waiver of constitutional rights under Michigan case law. It appears the sole

purpose of this effort was to forestall any attempt to petition this Court should he prevail in the Michigan courts. Despite the mechanical recitation of Michigan's equivalent constitutional provision, along with the Sixth Amendment, by the Michigan Court of Appeals, it is clear from the case that court relied upon that the *only* right to counsel that was in issue was the one found in the Sixth Amendment. Indeed, as noted above, ***the opinion of the court*** in ***People v Leonard***, 421 Mich 207, expressly observed that it was unnecessary to invoke any constitutional protections to find the statements of that defendant inadmissible. Both Respondent, in his initial brief on appeal, and the Michigan Court of Appeals, in its brief opinion, cite to ***dicta*** in the separate opinion of Chief Justice Williams (see *Leonard*, 421 Mich at 210-228), to argue that there is a more rigorous test for waiver of the Sixth Amendment (or Const 1963, art 1, § 20) right to counsel. In point of fact, the test proposed by Chief Justice Williams, and apparently relied upon by the Michigan Court of Appeals in finding Respondent's waiver invalid, is very much like the test rejected by this Court in *Patterson v Illinois*,

487 US 285, at 298-299. It should also be noted that Chief Justice Williams, while claiming to formulate a test under Michigan's Constitution, relied almost exclusively on Federal Sixth Amendment cases[3] (all but one from this Court) in crafting his proposed standard. See *Leonard*, 421 Mich at 216, 218-221, 222.

Although the Court of Appeals chose not to cite to it, Respondent, in pursuit of some independent state grounds to support his position, cited *People v Gonyea*, 421 Mich 462; 365 NW 2d 136 (1984), where three justices voted to reverse based on Const 1963, art 1, § 20, but fails to note that this was a 3-1-3 opinion where the concurring justice based his agreement strictly on the Sixth Amendment. *Gonyea*, at 482. (Cavanagh, J., concurring.) In short, while the Michigan Court of Appeals *could* have made its decision on independent State grounds under Const 1963, art 1, § 20, there is no evidence that it did so, save for the passing reference to the State

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[3]The Chief Justice also appears to have considered, if not relied upon, some of the cases and commentators which were also rejected by this Court in *Patterson*. See *Patterson*, 487 US at 295 n 8, 297 n 10 and *Leonard*, 421 Mich at 223 ns 11-13.

constitutional provision. When it is not clear from the record that there were independent and adequate state grounds for the decision, and when it fairly appears that the state court rested its decision on federal law, this Court will assume there are no such grounds. *Michigan v Long*, 463 US 1032, 1042; 103 S Ct 3469; 77 L Ed 2d 1201 (1983).

Looking to this Court's cases involving the right to counsel, and its waiver, we find the following. In *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), it was held that once a defendant, in custody, invokes his right to have counsel present during interrogation, questioning must stop until that right has been honored ***unless*** the defendant affirmatively initiates further communications with the police. *Edwards* was a Fifth Amendment case. *Edwards*, 451 US at 480-81, 482, 484-86.

In *Main v Moulton*, 474 US 159; 106 S Ct 477; 88 L Ed 2d 481 (1985), and *Michigan v Jackson*, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986), this Court made it clear that the Sixth Amendment right to Counsel afforded similar protection to a crimi-

nal defendant *after* the institution of formal charges. *Moulton*, 474 US at 170, *Jackson* 475 US at 629. Further, the Sixth Amendment places an affirmative duty on the State to respect and preserve defendants' decisions to avail themselves of this protection. *Moulton*, 474 US at 171. In order to effectuate this policy, *Jackson* extended the rule of *Edwards* to those situations where a defendant has asserted his Sixth Amendment right to counsel after an arraignment or similar proceeding. *Jackson*, 475 US at 636. Previously, in *Wyrick v Fields*, 459 US 42; 103 S Ct 394; 74 L Ed 2d 214 (1982), this Court clarified *Edwards*, and held that even after the defendant has acquired counsel, the *Fifth Amendment*[4] right to counsel was waived when the defendant initiated *interrogation* by requesting the police provide a polygraph examination. *Fields*, 459 US at 47-48. Similarly, *Patterson v Illinois*, 487 US 285; 108 S Ct 2389; 101 L Ed 2d 261 (1988), held that after the Sixth Amendment right to counsel has attached, but before counsel has been obtained,

---

[4]In *Fields* this Court expressly found that the lower court relied "exclusively" on the Fifth Amendment in its opinion. *Fields*, 459 US at 49.

that right may be waived via the mechanism of properly administered *Miranda* warnings.

The instant case represents the convergence of the Fifth and Sixth amendment right to counsel law of this Court, and provides the Court with a clear vehicle for answering the question of whether, given defendant initiated communication in accordance with *Michigan v Jackson*, waiver of the Sixth Amendment right to counsel requires something more than *Miranda* once the defendant has actually obtained the assistance of counsel. *Patterson*, *supra*, 487 US at 296 n 9.

The Michigan Court of Appeals, and undoubtedly other courts as well, continue to ignore the clear meaning of this Court's holding in *Patterson v Illinois*, and its effect on a defendant's ability to waive counsel for out of court proceedings and investigations. However, situations such as the instant case may, indeed, fall outside the purview of *Patterson*, because, unlike Patterson, the Respondent in this case *had* requested and obtained the assistance of counsel. See *Patterson*, 487 US at 296 n 9.

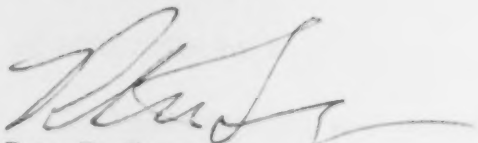
Waiver of a constitutional right, particularly the right to counsel in a criminal prosecution, is always a serious matter and should be examined closely. *Johnson v Zerbst*, 304 US 458; 58 S Ct 1019; 83 L Ed 2d 1461 (1938). Clearly, a waiver obtained by trickery or other misconduct by the state in derogation of the relationship between a defendant and his attorney should not be allowed to stand. However, there is a point at which a defendant must be accountable for his own actions in derogation of that relationship. Respondent believes this case fairly presents the question of how far, in the context of the criminal justice system, does the existence of an attorney-client relationship go toward limiting the defendant's responsibility for his actions when he attempts to handle the out of court aspects of the case on his own behalf . Put another way; When the Sixth Amendment says "the assistance of counsel" does it mean *assistance* of counsel or *control* by counsel? This is an issue that is important to the constitutional jurisprudence of the Nation and should be reviewed by this Court..

CONCLUSION

WHEREFORE, Petitioner respectfully submits that plenary review is warranted, and requests that certiorari be granted.

Respectfully submitted,

Elwood L. Brown
Prosecuting Attorney
County of St. Clair



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APPENDIX A COURT OF APPEALS OPINION

APPENDIX A: COURT OF APPEALS OPINION

PEOPLE V RICO ANNEZ SANDERS

DOCKET NO. 145890 UNPUBLISHED

OCTOBER 25, 1994

Before: HOLBROOK, JR., P.J., and McDonald and R.L. Evans, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of two counts each of first-degree felony murder, MCL 750.316; MSA 28.548, and felony-firearm, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for each of the murder convictions and to two years' consecutive imprisonment for the felony-firearm convictions. He now appeals as of right. We reverse and remand for a new trial.

Plaintiff failed to show that defendant knowingly and intelligently waived his right to counsel's presence at this polygraph interview. US Const, Am VI; Const 1963, art 1, §20.

APPENDIX A COURT OF APPEALS OPINION

Plaintiff showed no more than defendant's affirmative responses to the questions of whether he understood his Miranda rights (Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 [1966]) and whether he relinquished those rights. People v Leonard, 421 Mich 207, 424[Sic]; 364 NW2d 625 (1984). Evidence of the polygraph examination should not have been admitted at trial. Because we cannot conclude that the error was harmless, we reverse defendant's convictions and remand for a new trial.

In light of our resolution of defendant's first issue, we need not address his remaining claims.

Reversed and remanded for a new trial. We do not retain jurisdiction.

Donald E. Holbrook, Jr.
Gary R. McDonald
Robert L. Evans

APPENDIX B: MICHIGAN SUPREME COURT ORDER

APPENDIX B: ORDER OF MICHIGAN SUPREME COURT

ORDER

Entered: July 12, 1995

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

SC: 102124

V COA: 145890

LC: 91-000879-FH

RICO ARNEZ SANDERS,

Defendant-Appellee.

_____/

On order of the Court, the motion for reconsideration of this Court's order of March 31, 1995 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

APPENDIX B: MICHIGAN SUPREME COURT ORDER

Boyle and Weaver, JJ., would grant the motion for reconsideration, and on reconsideration would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the forgoing is a true and complete copy of the order entered at the direction of the Court.

July 12, 1995 /s/ Corbin R. Davis
Clerk

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No. 95-633

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

- v -

RICO ARNEZ SANDERS,
Respondent.

MOTION TO LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
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No. 93 - 633

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

RICO ARNEZ SANDERS
RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, RICO ARNEZ SANDERS, who is now held in the Michigan Reformatory at Ionia, Michigan, asks leave to file the attached Brief, in opposition to the Petition for Writ of Certiorari to the Supreme Court of the State of Michigan without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39.

The Respondent's affidavit in support of this motion is attached hereto. Respondent has been represented by undersigned appointed counsel for all post-conviction proceedings in the Court of Appeals and the Supreme Court of the State of Michigan. See attached Order.

Stuart D. Hubbell

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Counsel for Respondent

No. 93 - 633

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

RICO ARNEZ SANDERS
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

ARE THERE COMPELLING REASONS TO GRANT CERTIORARI OR IS AN IMPORTANT FEDERAL QUESTION PRESENTED IN THIS MATTER WHERE THE MICHIGAN COURT OF APPEALS, IN AN UNPUBLISHED OPINION HAVING NO PRECEDENTIAL VALUE, WHILE RELYING ON THE SIXTH AMENDMENT RIGHT TO COUNSEL, NEVERTHELESS BASED ITS DECISION UPON MICHIGAN COMMON LAW AND MICHIGAN CONSTITUTIONAL PROVISIONS IN GRANTING A NEW TRIAL?

II.

SHOULD THIS COURT DENY CERTIORARI WHERE THE MICHIGAN COURT OF APPEALS GRANTED A NEW TRIAL HAVING DETERMINED THAT, AFTER THE ACCUSED HAD BEEN ARRAIGNED, HIS COUNSEL HAD BEEN APPOINTED AND A PRELIMINARY EXAMINATION HAD BEEN CONDUCTED, THE POLICE INITIATED INTERROGATION OF THE ACCUSED OUTSIDE THE PRESENCE OF ACCUSED'S COUNSEL AND OBTAINED A CONFESSION FROM HIM IN VIOLATION OF MICHIGAN COMMON LAW AND CONSTITUTIONAL PROVISIONS AS WELL AS SIXTH AMENDMENT RIGHT TO COUNSEL PROTECTIONS?

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CONSTITUTIONAL PROVISIONS INVOKED

The **Sixth Amendment** to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Article 1, Section20 of the Michigan Constitution of 1963 provides: "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his defense . . . "

COUNTERSTATEMENT OF THE CASE

After Respondent Sander's arrest on March 27, 1991, he was arraigned in a Michigan District Court where counsel was appointed pursuant to his request. Subsequent to a preliminary examination held in that court on April 4, 1991, Respondent was bound over for trial in the Michigan Circuit Court.

On April 10, 1991, Respondent's trial counsel wrote the prosecuting attorney advising him that "my client maintains that he is not the shooter and has requested that he be given a polygraph examination." In response, the prosecutor wrote in response, "I received your letter in which you requested on behalf of your client that he take a polygraph on the issue of whether he shot the victims in the case. I will make arrangements to schedule your client for a polygraph at the Michigan State Police Polygraph Examiners Office. As soon as I receive a notification from them of the soonest possible date and time, I will notify you."

Notwithstanding these express representations by the prosecutor to him, defense counsel testified that he was never notified of the date, time or place of the polygraph examination arranged by the prosecutor nor of the fact that that examination was, in fact, taking place. [Ginther Hearing, p 9] Instead, shortly after the Preliminary Examination, unbeknownst to his counsel, Mr. Sanders was taken from jail to the Michigan State Police station for the polygraph examination. He was unaccompanied by counsel. At the conclusion of that examination, Respondent was interrogated by State Police officers Myatt and Hudson in

the absence of his counsel and allegedly made inculpatory admissions to the officers.

Respondent's trial counsel testified that, had he known the examination was going to occur, he would have advised his client never to talk with any polygraph examiner after the examination because, as counsel testified, he understood that a polygraph examiner invariably seeks to obtain a post examination confession as part of the process. "I mean, he [the examiner] is never going to let that chance go by without getting a statement from a defendant if he can. At least that is my conception of the State Police Polygraph." [Ginther Hearing, p 10]

Both officers testified at a pre-trial evidentiary hearing conducted to determine whether Respondent's statements to the officers should be suppressed. The polygraph examiner, Sgt. Myatt, stated under oath:

> Q. And were you aware he had an attorney, Mr. Sanders?
>
> A. Yes, I was.
>
> Q. Okay. Did you have any waiver from his attorney for him to be here?
>
> A. From ... no, not from his attorney. No, I did not.
>
> Q. Okay. How did you tell Mr. Sanders that he - - you thought he had failed the polygraph and was lying?
>
> * * *
>
> A. I told Mr. Sanders after the instrument portion, that in my opinion, he was not being truthful.

[Walker Hearing, p 36]

Thereupon, according to the witness, Sgt. Myatt interrogated Mr. Sanders and obtained inculpatory admissions from him.

At the same hearing, Detective Hudson testified that he

[Det. Hudson] initiated the second interrogation of Mr. Sanders. Detective Hudson stated under oath:

> Q. When would you have asked the questions of Mr. Sanders?
>
> A. I ask questions after the polygraph examination was completed and after Mr. Myatt had done his post interview.
>
> * * *
>
> Officer Myatt approached me and indicated that I might want to speak with Mr. Sanders about this, that he has something he probably wanted to say to me, so . . .

[Walker Hearing, p 43]

On cross-examination, Detective Hudson admitted he initiated the conversation with Mr. Sanders after Sergeant Myatt told him that Respondent probably wanted to talk to him. Detective Hudson acknowledged that he was aware that Mr. Sanders had an attorney at that time. He testified: "I had no knowledge of any permission from the attorney to speak to Mr.Sanders other than that was what's necessary for the polygraph." [Walker Hearing, p 47]

It is not disputed that prior to the polygraph examination, Sgt. Myatt read Respondent his "Miranda rights" [1] and had Respondent sign a Michigan State Police form acknowledging that he had been advised of those rights. Nor is it disputed that Respondent had been advised of his "Miranda" rights by Det. Hudson, as well, at the time Hudson conducted his post-polygraph interrogation.

At the trial, the trial court admitted Respondent's

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1. Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

statements into evidence over Respondent's objections and his conviction thereafter followed. In reversing that conviction and granting a new trial, the Michigan Court of Appeals held:

> Plaintiff [the People] failed to show that defendant knowingly and intelligently waived his right to counsel's presence at his polygraph interview. US Const, Am VI; Const 1963 [Michigan Constitution], art 1, section 20. Plaintiff showed no more than defendant's affirmative responses to the questions of whether he understood his Miranda rights . . . and whether he relinquished those rights. People v Leonard, 421 Mich 207, 424 [sic] 364 NW2d 625 (1984). Evidence of the polygraph examination should not have been admitted at trial. Because we cannot conclude that the error was harmless, we reverse defendant's convictions and remand for a new trial.

People v Sanders, unpublished,
Michigan Court of Appeals docket # 145890,
Decided October 25, 1994.
Appendix A to Petition for Certiorari

On January 18, 1995, the Michigan Court of Appeals subsequently denied the People's motion for rehearing "for lack of merit in the grounds presented." (Appendix A hereto) Subsequently, on March 31, 1995, the Michigan Supreme Court denied the People's application for leave to appeal the Court of Appeal's decision, stating that the Supreme Court was "not persuaded that the question presented should be reviewed by this Court." (Appendix B hereto) On July 12, 1995, the Michigan Supreme Court denied the People's motion for reconsideration of its March 31, 1995 Order, stating that "it does not appear that the order was entered erroneously." (Appendix B to Petition for Certiorari).

Respondent has remained incarcerated throughout these various appellate proceedings. No new trial has yet occurred.

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO COMPELLING REASONS TO GRANT CERTIORARI NOR IS AN IMPORTANT FEDERAL QUESTION PRESENTED IN THIS MATTER WHERE THE MICHIGAN COURT OF APPEALS, IN AN UNPUBLISHED OPINION HAVING NO PRECEDENTIAL VALUE, WHILE RELYING ON THE SIXTH AMENDMENT RIGHT TO COUNSEL, NEVERTHELESS BASED ITS DECISION UPON MICHIGAN COMMON LAW AND MICHIGAN CONSTITUTIONAL PROVISIONS IN GRANTING A NEW TRIAL.

Respondent urges that involvement of this Court in review of the Michigan Court of Appeals decision herein would be improvident and wasteful of this Court's important resources. Petitioner has failed to provide a convincing basis for concluding that there are compelling reasons for granting its Petition for a writ of certiorari. Further, Petitioner has failed to present a federal question for this Court's review. See S Ct Rule 10.

a. Granting Certiorari in this Matter Would Be an Improvident Waste of this Court's Resources since the Appealed Decision Is [i] Without Precedential Value and [ii] Does Not Constitute a Final Order Disposing of the Case.

The decision of the Michigan Court of Appeals appealed from in this matter on its face verifies that it was unpublished. See Appendix A, Petition for Certiorari. Michigan court rule, MCR 7.215, and supporting caselaw, makes clear that such an unpublished opinion is without precedential value or import and may not be cited nor relied upon as having any stare decisis stature. The opinion is a nonlegal happening except within the

context of the case in question. [1] Accordingly, for this Court to involve itself in the examination of the challenged opinion would be the worst and most futile of investments of its precious, much-needed attention to authentic issues.

Furthermore, the appealed from decision is hardly the end of this disputed matter. Only after the completion of the new trial ordered by the Court of Appeals' decision and the entry of a judgment by a jury at that trial can it be known whether the Court of Appeals opinion has caused the injury of which Petitioner complains needs address. At this point no damage has been inflicted upon the People except to require the prosecution of the new trial. Should Respondent be convicted at that new trial the claim raised by the People here would be moot. That being so, it is apparent that it would be, at best, an improvident employment of this Court's assets to engage in a determination as to whether there is merit to Petitioner's speculative appeal.

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1. MCR 7.215(C)(1) provides in pertinent part:

> (C) **Precedent of Opinions.**
> (1) An unpublished opinion is not precedentially binding under the rule of stare decisis.

The Michigan courts have consistently held that the unpublished opinions of the Michigan Court of Appeals have no precedential value under MCR 7.215(C). see Battiste v Department of Social Services, 154 Mich App 486; 398 NW2d 447 (1986); Priesman v Meridian Mutual Ins Co. 185 Mich App 123, 126; 460 NW2d 244 (1990); People v Polus, 197 Mich App 197, 203; 495 NW2d 402 (1992).

b. The Decision of the Michigan Court of Appeals Primarily Relied upon the Common Law of the State of Michigan Interpreting and Applying the Michigan Constitutional Guarantees and Such Decision, accordingly, Does Not Present a Federal Question for Review by this Court.

The issue presented in this matter, at base, is whether Respondent's positive responses to the Fifth Amendment Miranda warnings read to him by the police before and after the polygraph examination constitute an intentional and intelligent relinquishment of Respondent's constitutional rights to the presence and advise of his counsel at that crucial point in the process.

The factual context within which Respondent allegedly waived his rights to counsel are, of course, of paramount concern. At Respondent's express request, Counsel had been appointed at his arraignment. A preliminary examination had been conducted at which Respondent had been represented by such counsel. A polygraph had been requested by Respondent's counsel with the understanding that counsel would be advised of its time, place and would be able to attend the examination. Respondent's counsel testified he would never have consented to such an examination under other circumstances because he was aware that the police would employ the polygraph process to attempt to gain a confession from the Respondent in his absence. The polygraph was nevertheless arranged without Respondent's counsel's knowledge or consent and conducted outside of his presence. The police here knew Respondent was represented by counsel and knew that his counsel had not waived Respondent's right to have him present.

A reconstruction of Respondent's mind-set at the time must be envisioned. At his request the polygraph examination had

been requested by his own counsel. Respondent, himself, however, could not possess knowledge nor be aware of the fundamental importance of having his counsel present during the procedure. Further, the procedure itself, at least in the mind of a layman, could not go forward without a waiver of the rights set forth explicitly in the Miranda warnings.[1] Obviously and undeniably, in the circumstances, an unschooled accused person would acquiesce in conditions which no experienced criminal lawyer would ever agree to.

As appears from the argument presented in the following section of this Brief, Respondent submits that, under well established and accepted decisions of this Court, his right to counsel as guaranteed under the Sixth Amendment were unquestionably violated when the police, in such circumstances, proceeded to interrogate him and gain a confession from him. But the police actions further violated the constitutional principles of the State of Michigan which guaranteed him the protections of counsel. It is, in fact, those state constitutional guarantees and common law of the State of Michigan implementing them that were the foundation upon which the Court of Appeals in this matter relied in reaching the decision Petitioner seeks to overturn.

The Court of Appeals decision expressly refers to the Michigan constitutional provision, 1963 Const, art 1, section 20, which secured Respondent's right to have his counsel present at

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1. How could one answer the polygraph questions without relinquishing the right to remain silent?

the polygraph interview.[1] Furthermore, in concluding that, in merely "show[ing] no more than [Respondent's] affirmative responses to the questions of whether he understood his Miranda rights . . . and whether he relinquished those rights" the People had failed to show that Respondent had "knowingly and intelligently waived his right to counsel's presence at his polygraph interview" [2] the Court of Appeals relied upon Michigan precedent, not federal precedent, citing and following People v Leonard, 421 Mich 207, 364 NW2d 625 (1984)

This has controlling significance in the determination here as to whether a federal question is presented for determination by Petitioner's request for certiorari. For, in language which is unmistakably clear, Justice Williams in the Leonard decision stated that the issue presented was "[w]hether under the Michigan Constitution there was a valid waiver of defendant's right to the assistance of counsel for his defense." People v Leonard, supra, at p 210. Justice Williams continued at p 212:

> Thus, I hold that the prosecution did not meet its burden under the Michigan Constitution of proving that the defendant knowingly, intelligently, and intentionally relinquished his right to counsel for his defense. [Emphasis added].

Nor did Justice Williams leave the matter there. It is altogether clear from his opinion that he was defining "a basic

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1. Article 1, Section 20 of the Michigan Constitution of 1963 provides: "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his defense. . . . "

2. Court of Appeals unpublished decision, pp 1, 2, Appendix A, Petition for Certiorari.

test for determining a valid waiver of an article 1, section 20 right to counsel," under the Michigan Constitution not the Sixth Amendment People v Leonard, supra, p 222, and that, in doing so, the test adopted might well contain "a higher standard" than those found applicable by federal precedent under the Sixth Amendment, citing again at p 222 of the Leonard decision, Lego v Twomey, 404 US 477, 489; 92 US 619; 30 L Ed 2d 618 (1972). Accordingly, the 6 step test set forth at p 224 of his opinion [1]-- and the page of the Leonard opinion which was obviously referred to in the instant Court of Appeals decision, is the standard for determination under the Michigan Constitution article 1, section 20 and not under the Sixth Amendment.

It follows that, in seeking review of the unpublished Michigan Court of Appeals decision herein, Petitioner would have this Court review a state constitutional issue and not a federal question as required by Rule 10. Respondent respectfully urges that a grant of the writ in such circumstances would be inappropriate.

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1. This is manifestly the page of the Leonard decision The Court of Appeals decision intended to refer to in citing the Leonard opinion.

II.

THE PETITION FOR CERTIORARI SHOULD BE DENIED WHERE THE MICHIGAN COURT OF APPEALS GRANTED A NEW TRIAL HAVING DETERMINED THAT, AFTER THE ACCUSED HAD BEEN ARRAIGNED, HIS COUNSEL HAD BEEN APPOINTED AND A PRELIMINARY EXAMINATION HAD BEEN CONDUCTED, THE POLICE INITIATED INTERROGATION OF THE ACCUSED OUTSIDE THE PRESENCE OF ACCUSED'S COUNSEL AND OBTAINED A CONFESSION FROM HIM IN VIOLATION OF MICHIGAN COMMON LAW AND CONSTITUTIONAL PROVISIONS AS WELL AS IN VIOLATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL PROTECTIONS.

Respondent submits that an objective reading of the Petition filed in this matter leaves no basis for granting the writ.

Respondent refrains from rejoining Petitioner's critical evaluation of the Respondent's arguments purportedly asserted in the Michigan appellate courts -- a subject which occupies the majority of Petitioner's argument. Suffice it to observe that [i] the Michigan Court of Appeals entered its opinion rejecting Petitioner's position (Appendix A, Petition for Certiorari); [ii] the Michigan Court of Appeals rejected a rehearing "for lack of merit" (Appendix A hereto); [iii] the Michigan Supreme Court denied leave to appeal "because we are not persuaded that the question presented should be reviewed by this Court" (Appendix B hereto); and [iv] the Michigan Supreme Court rejected Petitioner's efforts to overturn the Court's order denying leave to appeal "because it does not appear that the order [denying leave] was entered erroneously." (Appendix B, Petition

for Certiorari).[1]

What is undeniable here is that both police officers have admitted that they initiated the interrogation of an accused who was in custody while knowing full well that the accused was represented by counsel, that counsel was not present and that they had no knowledge of any waiver by Respondent's counsel to an interrogation of the client absent counsel's presence. Given that factual predicate, the question which must be answered is whether the Sixth Amendment right to counsel can be circumvented by skilled, experienced police interrogators simply by reciting the Miranda warnings and gaining the accused's waiver of those rights as a condition of the polygraph process and all that follows.

In such circumstances, this Court has stated very clear guidelines as to the consequences:

> We hold that, if the police initiated interrogation after a defendant's assertion at the arraignment or similar proceeding, of his right to counsel, any waiver of defendant's counsel for that police-initiated interrogation is invalid.

Michigan v Jackson, 475 US 625, 636; 106 S Ct 1404; 89 L Ed 2d 631 (1986).

The Opinion continued at 633, stating that the Court "should indulge in every reasonable presumption in favor of protecting the constitutional claim."

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1. Notwithstanding Petitioner's arguments to the contrary, the Michigan Court of Appeals relied upon Justice Williams' concurring opinion in the Leonard decision. The Michigan Court of Appeals and the Michigan Supreme Court, in rejecting Petitioner's repeated efforts for reconsideration, have made that indisputable.

The Michigan Supreme Court decision of People v Leonard, supra, relied upon by the Michigan Court of Appeals in deciding this matter, affirmed that under Michigan constitutional guarantees the strongest presumption against waiver of the right to counsel, "[e]specially after the defendant has been arraigned" Leonard, supra, at 217-218. The Leonard decision and the Michigan Court of Appeals in deciding this case under decided Michigan precedent and Michigan Constitution art 1, section 20, explicitly and expressly, rejected the very position asserted by the Petitioner here. The mere recital of a Miranda warning without more will not suffice to show an intelligent and intentional waiver of counsel in a post-arraignment police interrogation of an accused conducted in the absence of the accused's attorney.

As this Court stated in Johnson v Zerbst, 304 US 458, 462-463; 58 S Ct 1019; 82 L Ed 1461 (1938):

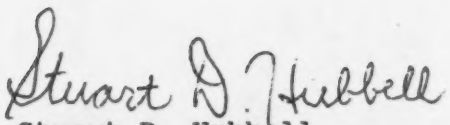
> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself . . .

This Court can be assured of a certainty that the Michigan Court of Appeals and the Michigan Supreme Court did not lightly reach their conclusions in this matter. Nor did those Courts waver in their respective conclusions that the Court of Appeals decision was mandated by the manifest and fundamental necessity of protecting all accused from a deprivation of their right to independent counsel.

CONCLUSION

WHEREFORE, Respondent respectfully submits that the prayed for writ of certiorari should be denied as improvident, there being no showing of compelling reasons to issue the writ nor is an important federal question presented by the Petition.

Respectfully submitted,



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APPENDIX

APPEL..X A: COPY OF COURT OF APP..LS ORDER

ORDER

People v Rico Arnez Sanders

Docket # 145890

L.C. # 91000879 FC

Donald E. Holbrook, Jr.

Presiding Judge

Gary R. McDonald
Robert L. Evans

Judges

The Court orders the motion for rehearing DENIED for lack of merit in the grounds presented.

A true copy entered and certified by Ella Williams, Chief Clerk, on

January 18, 1995

/s/ Ella Williams
Chief Clerk

APPENDIX B: ORDER OF MICHIGAN SUPREME COURT

ORDER

Entered: March 31, 1995

102124

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 102124
COA: 145890
RICO ARNEZ SANDERS LC: 91-000879-FC

Defendant-Appellee

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

80328

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court

March 31, 1995

/s/Jacqueline B. MacKinnon
Deputy Clerk

No. 95-633

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

- v -

RICO ARNEZ SANDERS,
Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF GRAND TRAVERSE)

DENISE MELICHAR, being first duly sworn, deposes and says that on the 7th day of November, 1995, she filed with this Court the following:

MOTION TO LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
PROOF OF SERVICE

and mailed one (1) copy of same to:

Peter R. George
Prosecutor
301 County Building
Port Huron, MI 48060

Denise Melichar
Denise Melichar

Subscribed and sworn to before me
this 7th day of November, 1995

Dolores Kratochvil
Dolores Kratochvil, Notary Public
Grand Traverse County, Michigan
My Commission Expires: 5-26-96